

The Basics of Sexual Harassment

Sexual Harassment is a violation both of Federal Law and the laws of most states. For employers, it is fairly easy to take steps to prevent sexual harassment and to defeat claims of sexual harassment. On the other hand, where an individual has such a claim, it must be pursued in the proper way. In addition, a claim for sexual harassment must be brought very quickly. This article is written for both the employer and the victim of sexual harassment.

What follows is a very brief explanation of what constitutes sexual harassment, how to handle a situation in which you are being sexually harassed so as to preserve your rights, and how to pursue your legal rights if it becomes necessary. In addition, we have included a section on retaliation for both the employer and the employee.

The final section will provide helpful tips for employers to avoid sexual harassment claims. Please be aware however that this article only attempts to provide a description in the broadest terms and is not intended as legal advice. There is no substitute for the advice of a qualified sexual harassment attorney.

What Is Sexual Harassment?

Sexual Harassment is generally of two types: Quid Pro Quo and Hostile Environment. Quid Pro Quo sexual harassment occurs when an employer or supervisor demands sexual favors in exchange for raises, promotions, or other perks, or threatens an employee for failure to provide sexual favors. The fact that you may have given in to those demands does NOT mean that you have no case. The key is that the sexual advances are unwanted. A woman who provides the sexual favors in an effort to save her job may nonetheless pursue a case of sexual harassment.

Hostile Environment sexual harassment occurs when the working environment is made hostile because of its sexual nature. You may have a claim for Hostile Environment Sexual Harassment if your working environment is made intolerable by photos, comments, jokes, or other acts of an offensive sexual nature, including physical touching or attempted rape (though there are other remedies as well). Where there is Quid Pro Quo Sexual Harassment there is invariably a Hostile Environment as well, but the fact that there has not been a direct request for sexual favors does not mean that there is no Hostile Environment.

The key to a Hostile Environment Sexual Harassment claim is the seriousness and pervasiveness of the sexually charged conduct. If the conduct happens only once, it is not pervasive, but it may still be actionable if it is serious enough, for example an attempted rape. If the conduct is not very serious, for example a comment about your body, it may still be actionable if it happens several times a day for an extended period of time. But most sexual harassment does not reach these extremes. Rather it is a combination of the two factors. For example, where sexually explicit photos are placed in the work area on 6 or 8 occasions along with comments about them, such conduct may be actionable even though it is neither extremely serious nor extremely pervasive, because in combination, it is serious and pervasive enough.

When considering the severity of the conduct, there is no question that physical touchings of a sexual nature will be considered more serious than photos, sexually graphic e-mails, and sexual comments and jokes. But this does not mean that the latter are not actionable and a combination of them certainly makes your case

stronger.

Co-Worker v. Supervisor Harassment and Tangible v. Non-Tangible Job Actions

It will make a difference whether the sexual harassment has been taken by a co-worker or by a supervisor. Where the action is taken by a co-worker, your employer will only be responsible if you have complied with your employer's sexual harassment policy, and have reported the sexual harassment to the proper personnel whether a supervisor, manager, human resources department, or even the president or owner of the company. Make sure that you take these actions.

Where the sexual harassment is taken by a supervisor, the next question is whether there has been a tangible employment action. A tangible employment action is an action which changes your job. Such things as demotion, termination, salary cuts, denial of overtime, and reduction of work hours which cuts down your pay are all tangible employment actions. This list is not exhaustive.

If there has been no tangible employment action, but the action has been taken by a supervisor, then you can still prevail on your claim for sexual harassment, but your employer can assert what are called affirmative defenses. That is, if the employer can prove that it made a good faith effort to fight sexual harassment in the workplace and that you did not cooperate with that effort, the employer can still prevail.

Where there has been a tangible employment action, the employer will be liable, but may still avoid punitive damages. In Quid Pro Quo cases there is almost always a tangible employment action.

What To Do Within Your Company If You Are Sexually Harassed

If you are being sexually harassed, ask the harasser to stop AND report it to your supervisor. If that fails to resolve the problem, take it to his or her boss and on up the line. You should also report it to your company's human resources department. If your supervisor or another manager is the harasser take your complaint to someone higher up.

Does your employer have a sexual harassment policy? READ the policy. Immediately report any sexual harassment to the individuals identified in the sexual harassment policy.

Do not wait until the harassment reaches what you think will be the legal definitions of sexual harassment. Report it immediately. This will allow the employer to take actions to correct the problem and hopefully save you and your employer from having to deal with a lawsuit.

In the case of Quid Pro Quo Sexual Harassment where you have been fired, you should still report it to your employer's human resources department. You should ask them for your job back and to be placed in a position outside the control of your harassing supervisor.

Taking Legal Steps

If you are being sexually harassed and your company is not addressing the situation to your satisfaction, you do have legal rights. Sexual Harassment is a violation of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e is the code citation). You must file a "Charge of Discrimination" in this case a charge of sexual

harassment with the United States Equal Employment Opportunity Commission (EEOC) within 180 days of the harassing conduct. If your state has a Human Rights or Employment Rights Act which addresses Sexual Harassment, your time to file with the EEOC will be extended to 300 days. In the alternative, you may file with your state agency. If the EEOC or the state agency tells you that you don't have a claim, FILE IT ANYWAY. Do NOT let an administrative person or an investigator tell you that you cannot file a charge. It is your legal right to file this charge and if you fail to file it in a timely manner, you can lose your right to pursue your case in court.

If the EEOC gives you a Notice of Right to Sue, you MUST file your case in Federal Court within 90 days. 90 days does NOT mean three months. Some months have 31 days and if you file in 92 days, your case may be dismissed by the court as untimely.

You should consult an attorney immediately as well. Most lawyers will want to take you to the EEOC or your state's agency. In this way, they can make sure that your charge includes all of the necessary information. If your charge lacks the necessary information, your case may be dismissed by the court. If you have already filed a charge, but have not yet received a Notice of Right to Sue or other determination, your lawyer can still amend it to include the necessary information.

Retaliation

It is illegal for an employer to retaliate against you for having reported sexual harassment or for having filed a charge with the EEOC or equivalent state agency, or for that matter with a court. As a general rule, retaliation cases are easier to prove than sexual harassment cases, and jury awards can be considerably higher. Therefore, smart employers will immediately take note of sexual harassment complaints and make affirmative efforts to make certain that no one retaliates against you.

If someone takes retaliatory action against you report it immediately. This includes a situation where you have been fired. Report it to your employer's Human Resources Department and ask for your job back.

If you are an employer who has been informed of sexual harassment you should take the complaint seriously and immediately investigate it. Do NOT take action against the victim. If you must move the victim, do not let such a move reduce the victim's salary or income. If at all possible you should get the victim's approval of the job change first.

Proving Your Case

Proving a case of sexual harassment or retaliation can be difficult. If you are being harassed with verbal comments, it may be helpful to get them on tape. Be aware that recording a conversation without everyone's permission may be illegal in your state. Keep copies of sexually explicit e-mails, letters, photos, or other tangible items. If there are drawings on furniture or other items that you cannot keep, take photographs of them. These will help your employer address the problem as well.

You should also be aware who might have witnessed the sexual harassment because what these people say later will be important.

How An Employer Can Avoid Liability And Punitive Damages

Every employer should have a sexual harassment policy. If you do not have one you should contact an attorney to help you put one in place. Your sexual harassment policy should state right up front that sexual harassment will not be tolerated in your place of business. Provide at least two different people to whom sexual harassment can be reported. This way, if one of those people is the harasser, there is someone else to whom an employee can complain. Provide that policy to every employee and have each sign a document stating that he or she has received the policy, and read and understands it.

You should provide sexual harassment and diversity training to your staff and employees periodically. Many employment law firms also put together presentations which will suit your purposes. These training sessions should include not only an explanation of what kinds of conduct might subject you to liability for sexual harassment, but should also include an explanation of how to report sexual harassment and to whom.

As noted above, if you receive a complaint of sexual harassment investigate it immediately and take measures to prevent any retaliatory action. Any retaliatory action can multiply the cost to you later. If you find that harassment has taken place you need to act quickly. If you can take the harasser away from the victim either by changing one or the other's jobs or by terminating the harasser, do so. It will always look better to a court or agency if you move the harasser rather than the victim. But do not put the harasser in a position to harass others because if he does so, you are likely then to be subjected to punitive damages. In addition, you should give the harasser remedial sexual harassment and diversity training. Again, hiring a law firm that prepares such presentations is ideal.

If a charge of discrimination is filed against you with the EEOC or other state agency, do not handle it yourself. Hire an employment attorney immediately. And again, take all steps possible to avoid retaliatory actions. If you no longer employ the complaining employee, be sure that your Human Resources Department does not give negative references. This may be actionable retaliation.

If you are sued for sexual harassment, it makes sense to settle the case if you can. Although it may be painful, it will probably be much less expensive than defending the case, particularly if you lose. You could find yourself paying not only your attorney's fees, but those of your employee's attorney's as well. And in any event, a settlement will usually be confidential. On the other hand, if you really are innocent and the damages claimed are large enough, it may be worth defending the case. But watch your attorney's bills carefully to make sure that you are getting the best use of your resources. Finally, do not get emotional about these cases. You are running a business and making money should be your paramount concern.

Conclusion

We spend most of our lives at work. Our workplaces should be a positive environment. A workplace without sexual harassment is better for both employer and the employee as it is more productive and a more pleasant place to be. Employers should take all steps possible to avoid sexual harassment in the workplace and to address it when it exists. Employees need to report any sexual harassment to their employers, make a record of it, and take the necessary steps to preserve their legal

rights.

About the Author

Aaron B. Maduff is the senior partner in the Chicago Civil Rights Law Firm of Maduff & Maduff. His practice covers employment matters including discrimination, sexual harassment, overtime and minimum wage claims, claims brought pursuant to the Family and Medical Leave Act, and Constitutional violations including police misconduct and school cases. Aaron Maduff has also drafted legislation and testified before the Illinois Senate on employment matters. He is licensed in Illinois, Minnesota, Colorado, Washington D.C., and numerous Federal Courts including the Supreme Court of the United States. He is an active member of the National Employment Lawyer's Association and on the Executive Board of the Illinois Chapter of that organization. For more information visit the firm's website at www.madufflaw.com.